INDEX

CITATIONS

417131—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, CIO, AND NUTONE, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on November 23, 1956, holding, at the instance of United Steelworkers of America, CIO, that the Board had erred in dismissing a portion of a complaint alleging unfair labor practices by NuTone, Incorporated, and directing that the Board modify its order to conform to the court's opinion.

OPINIONS BELOW

The opinion of the court below (Appendix, *infra*, pp. 12–25) is not yet officially reported. The findings, conclusions, and order of the Board (R. 18–55, 57–69) are reported at 112 NLRB 1153.

JURISDICTION

The judgment of the court below was entered on November 23, 1956 (Appendix, *infra*, pp. 25–26). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether a rule prohibiting employees from distributing literature in the employer's plant, otherwise valid under the tests enunciated by this Court, becomes invalid if the employer, himself, is distributing literature setting forth his own non-coercive views concerning unionization.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are reprinted in the Appendix, *infra*, pp. 26–29.

STATEMENT

Following the customary proceedings under Section 10 of the Act, the Board found that NuTone had engaged in a number of unfair labor practices against its employees, including unlawful interference with their organizational rights, discriminatory refusal to reinstate certain employees after an economic layoff, and unlawful support and assistance to an organization of its employees known as the NuTone Employee-Company Relations Committee (R. 57–60). The Board prescribed appropriate remedial relief for these violations (R. 61–63). However, the Board, one member dissenting, dismissed an allegation that Nu-

Tone had committed a further violation of the Act by discriminatorily enforcing a plant rule against employee distribution of literature in the plant (R. 59–60, 64–66). The court below, while generally affirming the Board's findings and order, reversed the Board with respect to its ruling on the no-distribution rule (App., *infra*, pp. 24–25). Since the validity of this reversal is the sole question presented by this petition, we shall set forth only the findings and conclusions relevant to this aspect of the case.

I.

THE BOARD'S FINDINGS AND CONCLUSIONS

NuTone, a New York corporation, operates a plant located on a public street in Cincinnati, Ohio, where it manufactures various electrical devices (R. 19). In the summer of 1953, United Steelworkers of America, CIO, engaged in an organizational campaign among NuTone's employees preparatory to a Board-conducted election scheduled for August 19, 1953 (R. 20; 113, 127). Prior to and during the organizational campaign, NuTone had in effect rules forbidding its employees to engage in solicitation of any kind on company time, to post signs of any kind, or to distribute any literature on company property (R. 26; 110). However, the company itself regularly posted signs throughout the plant and distributed literature, both for its own purposes and for charitable purposes or drives such as Community Chest (R. 25; 106, 109, 110).[1]

[1] This was the company practice both before and after the commencement of the organizational campaign.

When the Steelworkers' campaign got under way, NuTone posted notices reminding its employees of the foregoing rules and stating that the rules applied equally to pro-union and anti-union employee groups (R. 26; 109–110, 112, 72–73). During the pre-election period, the rules were uniformly applied to the employees who favored the Steelworkers and to those who opposed the Steelworkers. (R. 26). Management, however, consistent with its prior practice, did not deem itself bound by the rules which were directed to its employees, and itself distributed to the employees at the plant eight pieces of pre-election literature (R. 26–27; 110, 112, 114, 74).[2] This literature was anti-union in tone but was free of threat of reprisal or force, or promise of benefit (*ibid.*).

The parties did not challenge the company rules relating to solicitation and distribution, and both the trial examiner and the Board affirmed their legality (R. 28, 59, n. 2). The trial examiner was of the view, however, that the ban on employee distribution of literature in the plant precluded management from utilizing that medium of communication, and that NuTone's distribution of anti-union literature in the plant, even though the content of that literature was not coercive, constituted a discriminatory application of the rules, in violation of Section 8 (a) (2) and (1)

[2] During the same period, NuTone used the mails to send ten other pieces of non-coercive, anti-union material to its employees (R. 27, n. 4; 113–114, 118–120). This avenue of communication, like distribution at company entrances or anywhere else off plant property, was, of course, available to the employees under the company rule.

of the Act (R. 28).[3] The Board, one member dissenting, reversed the trial examiner in this respect (R. 59, 63). The Board noted that the anti-union literature distributed by NuTone was protected by Section 8 (c) of the Act, which guarantees the right to express and disseminate views, arguments and opinions in oral or printed form so long as they do not contain threats of reprisal or promises of benefit (R. 59). The Board held further that an employer's right to promulgate and enforce valid rules regulating the conduct of his employees may not be conditioned on the requirement that management itself be bound by such rules (*ibid.*). Finally, the Board concluded that the statutory protection accorded NuTone's dissemination of its non-coercive views was not forfeited because it engaged in other unfair labor practices for which a remedy had been provided (R. 60). See p. 2, *supra*.

II.

THE DECISION OF THE COURT BELOW

The Court of Appeals, affirming in other respects the Board's findings of unfair labor practice and its remedial order (App., *infra*, pp. 24–25), disagreed with

[3] The trial examiner found further support for his finding of discrimination in the circumstance that, after the defeat of the Steelworkers in the August 19 election and the elimination of that union as a contender for the status of bargaining representative of the employees, NuTone unlawfully assisted the NuTone Employee-Company Relations Committee by, *inter alia*, permitting and assisting it to distribute literature on plant property (R. 27, 28; 111, 121). As indicated above, p. 2, the Board found that this unlawful assistance was in and of itself a violation of the Act and directed its cessation (R. 60, 61, 62).

the Board's conclusions on the subject of the no-distribution rule (App., *infra*, pp. 15–24). Characterizing that issue as "a close and difficult one," the court observed that its resolution turned on "the interplay of several rights, some statutory and some inherent" (App., *infra*, pp. 15, 16). The court acknowledged that these several rights—the Section 7 right of employees to engage in organizational activities free of unlawful interference; the employer's right, protected by Section 8 (c), to express and disseminate non-coercive views and opinions; the right of free speech; and the inherent right of employers to maintain production, order, and discipline in their establishments—sometimes conflict and that the resolution of such conflict is the core of the problem in the instant case (*ibid.*).

Putting aside, at the outset, the impact of Section 8 (c), the court below first considered the problem of accommodating the Section 7 right of employees to organize and the countervailing right of employers to maintain production, order, and discipline. It concluded, in accord with prevailing authority, that "absent special circumstances, discrimination, or a specific purpose to suppress self-organization," no-solicitation rules are valid as to working time because of the obvious employer interest in maintaining production, and that, in the interest of keeping the plant clean and orderly, no-distribution rules are valid even as to non-working time (App., *infra*, pp. 16–18). The court noted that, indeed, there was "no dispute concerning the general validity of a broad no-distribution rule like the one in effect at NuTone." But since the justification for such a rule was the employer's

interest in order and discipline, the court concluded that NuTone's action in distributing its own literature, while contemporaneously prohibiting the employees from doing the same thing, vitiated the reason for the rule and rendered the rule invalid (App., *infra*, pp. 19–21).

The court below recognized that Section 8 (c) was open to a construction which would invalidate the above conclusion. That section, as the court noted, expressly provides that the dissemination of noncoercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice * * *." Hence, the argument runs, to condition the employer's right to disseminate his views by compelling him to forfeit his otherwise valid rule against employee distribution would dilute the guarantee which Section 8 (c) was designed to provide (App., *infra*, pp. 21–23). This was the view, the court below acknowledged, taken by the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, and by Judge Swan dissenting in *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905 (App., *infra*, p. 23). Unable to agree, however, the court below decided that while Section 8 (c) "wipes out the taint of discrimination which might attach to a speech by an employer favoring one union as against another, or against any and all unions," and also "wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or to solicit," it "does not wipe

out the basic rule that in order to enforce a no-distribution rule against employees, the employer must have a valid reason" (App., *infra*, p. 23). Accordingly, the court concluded that NuTone was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours and directed that the Board modify its order in conformity with the court's opinion (App., *infra*, p. 24).

REASONS FOR GRANTING THE WRIT

1. In holding that, notwithstanding the broad immunity granted by Section 8 (c) of the Act, the employer's dissemination of non-coercive views may vitiate otherwise valid no-solicitation and no-distribution rules, the court below acknowledges that it is in conflict with the view taken by the Sixth Circuit in *National Labor Relations Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78 (C. A. 6), and with the dissenting opinion of Judge Swan in *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905. The effect of the decision below is that an employer may not simultaneously exercise his unfettered right under Section 8 (c) to express his non-coercive opinions and his right, also well settled, to limit employee solicitation and distribution in the plant. The contrary view, set forth in *Woolworth*, preserves both rights.

Questions as to the permissible scope and application of plant rules forbidding employees to engage in union solicitation or distribution of union literature

were considered by this Court in the companion cases, *Republic Aviation Corp.* v. *National Labor Relations Board* and *National Labor Relations Board* v. *Le Tourneau Company of Georgia*, 324 U. S. 793.[4] However, in those cases, the Court dealt with the problem merely on the basis of "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U. S. at 797–798. The Court did not have before it the issue raised here, namely, whether enforcement against employees of no-distribution (and, by analogy, no-solicitation) rules, valid under the *Republic* and *LeTourneau* test, becomes an unfair labor practice if the employer is himself disseminating his own non-coercive views concerning unionization. As the court below pointed out (App., *infra*, pp. 15, 16, 24), that issue represents a "close and difficult" question of statutory interpretation, involving not only the Section 7 right of employees to organize and the countervailing right of employers to maintain order and discipline in their establishments—matters considered by this Court in *Republic* and *LeTourneau*—but also the scope of the immunity conferred by Section 8 (c). As in *Republic* and *LeTourneau*, the problem of accommodating these conflicting rights invites resolution by this Court.

2. The legal issue presented by this case arises out of the employer's application of a no-distribution rule.

[4] See also *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, where the question at issue was the validity of a rule banning non-employee distribution of literature on plant property.

But, as the opinions of the Board and of the court below recognize, the same essential problem is present in cases involving the application of no-solicitation rules. See *Livingston Shirt Corporation*, 107 NLRB 400.[5] The ruling below is thus significant for very substantial numbers of employers and employees in their day-to-day relations. We believe that the public importance of the question in the administration of the Act is clear.

CONCLUSION

The decision below is in conflict with a decision of the Sixth Circuit and presents a question which is of

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[5] In that case, the employer had in effect a valid rule enjoining activities for or against a union during working hours. During a pre-election period, the employer made non-coercive, anti-union speeches to the employees during working hours, but denied the union the use of its premises for a reply. The Board rejected the claim that, in the circumstances, the employer was under an obligation to give the union an opportunity to address the employees on the plant premises.

substantial public importance. This petition for a writ of certiorari should therefore be granted.*

Respectfully submitted.

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FEBRUARY 1957.

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* As noted in the text, the Board's position, although rejected by the Court of Appeals for the District of Columbia Circuit in the instant case, is supported by the Sixth Circuit's decision in the *Woolworth* case. The Board has indicated that it intends to adhere to its present position unless and until the contrary views expressed in the decision below should be definitively accepted. In these circumstances, the Solicitor General, while not taking any position at this time as to the relative merits of the respective views of the statute adopted by the court below and by the Court of Appeals for the Sixth Circuit, believes that resolution of the conflict by this Court would be desirable for the guidance of the Board and all others concerned. Accordingly, in order to accomplish this objective which seems plainly in the public interest, this petition for certiorari is being filed.

APPENDIX

1. Opinion of Court of Appeals

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12754

United Steelworkers of America, CIO, petitioner

v.

National Labor Relations Board, respondent

Nutone, Incorporated, intervenor

No. 12812

National Labor Relations Board, petitioner

v.

Nutone, Incorporated, respondent

United Steelworkers of America, CIO, intervenor

ON PETITION TO REVIEW AND MODIFY AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD (NO. 12754) AND ON PETITION TO ENFORCE THE ORDER (NO. 12812)

Decided November 23, 1956

Mr. Arthur J. Goldberg, with whom *Mr. David E. Feller* was on the brief, for petitioner in No. 12754 and intervenor in No. 12812.

Mr. Arnold Ordman, Attorney, National Labor Relations Board, of the bar of the Supreme Judicial

Court of Massachusetts, *pro hac vice*, by special leave of Court, with whom *Mr. Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent in No. 12754 and petitioner in No. 12812. *Miss Fannie M. Boyls* also entered an appearance for respondent in No. 12754 and petitioner in No. 12812.

Mr. Charles A. Atwood for intervenor in No. 12754 and respondent in No. 12812. *Mr. Thomas E. Shroyer* also entered an appearance for intervenor in No. 12754 and respondent in No. 12812.

Before PRETTYMAN, WILBUR K. MILLER, and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge*. These two cases come here from the National Labor Relations Board. The United Steelworkers of America began in the spring of 1953 a campaign to organize the employees of Nutone, Incorporated, a manufacturing concern of Cincinnati, Ohio. The campaign was heated but not violent. The ensuing election was lost by the Steelworkers, and shortly thereafter an unaffiliated union was formed in the plant. The Steelworkers filed with the Labor Board charges against Nutone, a complaint was issued, hearing was held, and a trial examiner's report and recommended order were issued. Exceptions were filed, and the Board adopted the examiner's conclusions in part and rejected them on one issue. The Steelworkers petitioned this court for review (No. 12754), and the Board petitioned for an enforcement order (No. 12812).

Upon the prehearing conference held in this court the issues in the two cases were phrased by stipulation made by the parties. We turn first to the *Steelworkers* case. The two issues there concern the denial of reinstatement and back pay to an employee named

Virgie Marshall and the enforcement by the employer of a no-distribution rule against the union while it (the employer) distributed anti-union literature.

While the organization campaign was in progress a temporary layoff due to economic conditions occurred. Virgie Marshall was among the employees laid off. She was a pro-union advocate and, according to the record, possessed an unusual talent for vivid oral expression. She directed this talent at fellow workers outside the plant. The examiner said the witnesses attributed to her "vile and obscene statements, as well as cursing and profanity." References to the record indicate that his description was pallid. He recommended against requiring her reinstatement. Recognizing that "in the realities of industrial life, particularly where vital issues are at stake during a strike or an organizing campaign, employees frequently express their sentiments in crude and vulgar language, not suited either to the pleasantries of the drawing room or to the courtesies of parliamentary disputation", the examiner was nevertheless of opinion there are limits to permissible verbal assault. He thought there are bounds of language beyond which an employee may not go and still retain his or her right to reinstatement. The Board agreed with the examiner. We have no difficulty in agreeing with the examiner and the Board on the point.[1] Perhaps such boundaries are far-flung, but wherever the line is drawn it will fail to encompass as permissible the language used by Virgie Marshall. The Board's power is to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.[2] The

[1] See *National Labor Rel. Bd.* v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953).

[2] 61 Stat. 147 (1947), 29 U. S. C. A. §160 (c).

basic policy of the Act is industrial peace. The Board is justified in believing that there is language which, when applied directly and personally to fellow workers, is disruptive of that peace and tends to preclude settlement of disputes.

The second issue is a close and difficult one. The company, prior to and during the organization campaign, had and enforced rules forbidding employees to engage in solicitation of any kind on company time or to distribute on company property any literature or to post thereon any signs. The company itself, however, regularly posted signs and distributed literature on its property. During the campaign the company enforced uniformly the no-solicitation and no-distribution rules against both groups of contending employees, but it did not deem itself bound by these rules and distributed on its property eight pieces of anti-union but non-coercive literature.

The issue before us, as stipulated by the parties, is: Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter.

This stipulation of the issue is, we may safely assume, precisely drawn. The issue is not the naked question whether the employer commits an unfair labor practice by distributing his own literature. Neither is it the naked question whether the employer commits an unfair labor practice when he enforces a no-distribution rule against his employees. The issue is whether it is an unfair labor practice for the employer to do both things at the same time, i. e., simul-

taneously distribute his own literature and prohibit his employees from distributing theirs. Thus the problem is not the application of any single provision of the statute but involves the interplay of several rights, some statutory and some inherent. Section 7 of the Act[3] gives employees the right to organize. Section 8 (a) (1)[4] protects that right by making it an unfair labor practice for an employer to interfere with his employees in their exercise of the right. Section 8 (c)[5] provides that the dissemination of views in writing shall not constitute an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit. Both employer and employees have rights of free speech. The employer has certain other inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property. Sometimes these several rights conflict.[6] We have such a problem here.

We first explore the situation presented by general considerations, absent subsection (c) of Section 8 of the Act. Except for the effect of legislation, and particularly Sections 7 and 8 (a) (1) of this Act, an employer's power to make rules governing employee organizational activities on company premises would be largely unlimited. Absent legislation he could promulgate and enforce rules prohibiting employees from soliciting in favor of a union or distributing union literature on the premises, solely because he was opposed to employee organization. The prequisites of possession or ownership shielded any anti-union pur-

[3] 49 Stat. 452 (1935), as amended, 29 U. S. C. A. § 157.

[4] 49 Stat. 452 (1935), as amended, 29 U. S. C. A. § 158 (a) (1).

[5] 61 Stat. 142 (1947), 29 U. S. C. A. § 158 (c).

[6] E. g., *Republic Aviation Corp.* v. *Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945); *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 100 L. Ed. ——, 76 S. Ct. 679 (1956).

pose behind the employer's rules, just as liberty of contract shielded anti-union conditions on employment or discharge for union affiliations and activity. Under the statute, however, employees have a right to organize and to engage in activities in aid of organization. That is a broad and strong right, although it is not without limits. It does not take precedence over the right of an employer to conduct his business in a reasonable manner and with reasonable prospects of success. But the property rights of an employer do not, as a general principle, justify restrictions on self-organization not reasonably related to the conduct of the enterprise in which he is engaged. Just as discharge of a union adherent is justified if there is "cause" for the employer's action,[7] so too there must be "cause" for limitation of employee organizational activities.[8] The Supreme Court recently made this clear, saying, with respect to the rights of employees on company premises, "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."[9]

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[7] See 61 Stat. 147 (1947), 29 U. S. C. A. § 160 (c).

[8] Even where there is some valid purpose relating to production or discipline, the limitation may have so great an effect on employee rights that some disruption of the employer's usual freedom of action may be deemed necessary. See, *e. g., Bonwit Teller, Inc.* v. *National Labor Relations Bd.*, 197 F. 2d 640 (2d Cir. 1952), cert. denied, 345 U. S. 905, 97 L. Ed. 1342, 73 S. Ct. 644 (1953).

[9] *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 113, 100 L. Ed. ——, 76 S. Ct. 679 (1956). See also *National Labor Relation Board* v. *Seamprufe, Inc.*, 222 F. 2d 858 (10th Cir. 1955), aff'd, 351 U. S. 105, 100 L. Ed. ——, 76 S. Ct. 679 (1956); *Maryland Drydock Co.* v. *National Labor Rel. Bd.*, 183 F. 2d 538 (4th Cir. 1950); *National Labor Relations Bd.* v. *American Furnace Co.*, 158 F. 2d 376 (7th Cir. 1946); *National Labor Relations Bd.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945).

It is well established that no-solicitation rules are valid as to working time because of the obvious interest in maintaining productive activity, and that they are valid as to non-working time in certain establishments such as department stores because of the peculiar circumstances of the business.[10] But, where such circumstances do not exist and rules restricting solicitation are applied to non-working time, they are generally invalid as to employee activities.[11]

No-distribution rules have had a checkered history. At one time the Board held that in the interests of keeping the plant clean and orderly it was not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times.[12] Later the Board took the position that, absent a particular showing that the rule was necessary to plant discipline, an employer could not validly apply such a rule to employees on non-working time.[13] Finally, in *Monolith Portland Cement Company*,[14] the Board held that a non-distribution rule relating to the plant proper could be applied generally to non-working time, absent special circumstances, discrimination, or a specific purpose to suppress self-organization.

Our attention has not been called to any case under the Wagner Act or its successor in which it has been

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[10] *National Labor Rel. Bd.* v. *May Department Stores Co.*, 154 F. 2d 533 (8th Cir. 1946), *cert. denied*, 329 U. S. 725, 91 L. Ed. 627, 67 S. Ct. 72 (1946). See also *Marshall Field & Co.* v. *National Labor Relations Bd.*, 200 F. 2d 375 (7th Cir. 1952).

[11] See *Republic Aviation Corp.* v. *Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945); *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373 (2d Cir. 1947); *National Labor Rel. Board.* v. *Glenn L. Martin-Nebraska Co.*, 141 F. 2d 371 (8th Cir. 1944).

[12] Tabin-Picker & Co., 50 NLRB 928 (1943).

[13] American Book-Stratford Press, Inc., 80 NLRB 914 (1948).

[14] 94 NLRB 1358 (1951).

held that an employer can prohibit either solicitation or distribution of literature by employees [15] simply because the premises are company property.[16] Employees are lawfully within the plant, and non-working time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.

In the instant case no question is raised concerning the rule barring solicitation on company property. Nor is there any dispute concerning the general validity of a broad no-distribution rule like the one in effect at Nutone. However the justification for a broad no-distribution rule by an employer is the need for keeping the plant clean and orderly or the need to maintain discipline. And so Steelworkers argue that, if the company itself undertakes to distribute literature at approximately the same time that it prohibits employees from doing the same thing, the reason for the no-distribution rule is vitiated. They say that, if a rule must have a reason in fact to support it, a rule demonstrably without a reason is invalid. The argument, premised upon Section 7 of the Act, and ignoring for the moment subsection 8 (c), is supported by the authorities, as we have indicated. Employees have no right to use their employer's premises to urge a political cause, to support a charity, or to promote programs alien to the right of self-organization; but they do have a right to engage in Section 7 activities, and that right must be given effect unless

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[15] Cf. *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 100 L. Ed. ——, 76 S. Ct. 679 (1956).

[16] In *Midland Steel Products Co.* v. *National Labor R. Bd.*, 113 F. 2d 800 (6th Cir. 1940), the court held that an employer could prohibit solicitation on company property at all times because of controversies and animosities likely to be aroused among employees.

there is some valid reason to the contrary relating to production or discipline.

Thus we come to the next phase of the problem. Does the fact that the employer distributes literature on the plant property demonstrate that there is no valid reason (in cleanliness, order, production, discipline, etc.) for prohibiting distribution? If the employer himself distributes literature in the plant, how can he validly assert that the distribution of literature would litter the property, distract attention from production, or instigate argument to the disruption of discipline? When the employer strips himself of the reason for his objection, does he not thereby lose the right to object?

In respect to distribution no one seems to dispute the right of an employer to impose upon his employees any and all restrictions, limitations, conditions, etc., which he imposes upon himself. These may relate to amounts, times, places, nature, and all the terms which may be imposed to protect order, cleanliness, production and discipline. The question is whether the employer, by distributing under certain conditions or restrictions, thereby negatives the reason for prohibiting distribution under precisely those same conditions and restrictions.

This part of the problem is a matter of realism and common sense. It seems to us unrealistic to say that, if an employer distributes certain amounts of literature at certain places at certain times, he can nevertheless claim that the distribution of the same quantity of literature at the same places and at the same or similar times would be disruptive of order or cleanliness. This is one of the keys to the ultimate conclusion in the problem before us, but it is not susceptible of extended explanation or discussion. We think that, if an employer distributes literature

in certain amounts under certain conditions, he cannot be heard to say that such distribution is a detriment to his operation; *i. e.*, such a detriment as will support a restriction upon Section 7 rights of employees. It follows from *Labor Board* v. *Babcock & Wilcox Co.*[17] and cases there cited that, being without a reason for a rule, he is not entitled to a rule of no-distribution.

But it is argued that to hold that an employer may not prohibit employee distribution if he himself distributes is to impose a condition upon the employer's right to distribute. It is said that the holding would be equivalent to holding that an employer cannot distribute unless he permits employee distribution under similar conditions. And that argument brings us face to face with subsection (c) of Section 8 of the Act. Section 8 relates to unfair labor practices, and subsection (c) is:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Interpretation of this subsection has given rise to many difficulties,[18] but we need not venture too far

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[17] *Supra* note 15.

[18] Bonwit Teller, Inc., 96 NLRB 608 (1951), *enforcement denied*, 197 F. 2d 640 (2d Cir. 1952), *cert. denied*, 345 U. S. 905, 97 L. Ed. 1342, 73 S. Ct. 644 (1953); Livingston Shirt Corporation, 107 NLRB 400 (1953); *National Labor Relations Bd.* v. *F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954). And see Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 Va. L. Rev. 1037 (1952); Note, *The Coercive Character of Employer Speech: Context and Setting*, 43 Geo. L. J. 405 (1955).

into the discussions in those cases. One view is that the subsection is absolute, the argument being that Congress was aware of the problem when it inserted this subsection in the statute in 1947. The *Republic Aviation* case [19] had been decided in 1945, and the Supreme Court had described the case (and its companion case, *National Labor Relations Board* v. *Le Tourneau Company of Georgia*) in the following language: "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." [20] The Senate Report on the proposed subsection [21] specifically referred to the restriction placed by the Board upon the decision in *Thomas* v. *Collins* [22] and said that it believed the Board's decision in *Clark Bros. Co., Inc.*,[23] to be too restrictive. If Congress, with the general problem thus before it, had intended that the dissemination of views be subject to other limitations, it would have said so. The subsection says flatly that the dissemination of views in written form shall not constitute an unfair labor practice if the expression contains no threat of reprisal or promise of benefit. It contains no other condition or limitation. To say the subsection means that such distribution shall not constitute an unfair labor practice when, as, and if it is coupled with permission to employees to distribute would be to write into the statute a con-

[19] *Republic Aviation Corp.* v. *Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945).

[20] 324 U. S. at 797–798.

[21] S. Rep. No. 105, 80th Cong., 1st Sess. 23–24 (1947).

[22] 323 U. S. 516, 89 L. Ed. 430, 65 S. Ct. 315 (1945).

[23] 70 NLRB 802 (1946), *enforcement granted*, 163 F. 2d 373 (2d Cir. 1947).

dition not there. The foregoing is the course of one side of the debate.

The other view is that the subsection undoubtedly wipes out the taint of discrimination which might attach to a speech by an employer favoring one union as against another, or against any and all unions, and which might thus be illegal as unfair.[24] It wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or to solicit. But it does not wipe out the basic rule that in order to enforce a no-distribution rule against employees the employer must have a valid reason.

The former of the foregoing views is the one taken by the Court of Appeals for the Sixth Circuit in the *Woolworth* case[25] and by Judge Swan dissenting in *Bonwit Teller*.[26] With the utmost deference to those authorities we find ourselves in disagreement with them. We think the latter of the two views above described is correct.

We suppose everyone would agree that the question is a close and elusive one. Indeed the answer might almost seem to depend upon the way in which the question is put. If we ask, "May an employer distribute noncoercive literature on plant property if he does not also permit employees to do the same thing?", the answer might seem to be, under subsection (c), "Yes." But that is not the question here. The question is: May an employer prohibit employees from distributing literature on plant property if he has by his own action demonstrated the absence of a valid

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[24] See, e. g., *National Labor Relations Bd.* v. *American Furnace Co.*, 158 F. 2d 376 (7th Cir. 1946).

[25] *National Labor Relations Bd.* v. *F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954).

[26] *Supra* note 8, 197 F. 2d at 646.

reason for such a prohibition? And the answer to that question must be: He may not.

We think the conclusion we reach does not write an improper restriction upon a statutory provision not so restricted in terms. Section 8 of the Act flatly prohibits an employer from interfering with the organizational activities of his employees. But the Board and the courts have held that he may interfere with those activities for reasons which he finds in the needs of production, order, cleanliness or discipline. That permission to him is not in the statute in terms. It was a recognition by the enforcing authorities of inherent rights on the part of the employer. It takes no amendment to the statute to say that, when this permission, engrafted upon the statute, is not applicable to a given employer, the unrestricted prohibition of the statute against interference with employee activities comes into play. The statute itself is not thereby amended; it thereby comes into literal effect.

We are fully aware of the restrictions upon judicial review of Board findings and orders, but the present case concerns statutory interpretation and clearly falls within the competence of the court to rule upon the questions presented.

We conclude that the employer here, Nutone, Incorporated, was guility of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during nonworking hours. The Board's conclusion to the contrary must be set aside and the case remanded with directions to modify paragraph (c) of the order so as to require Nutone to cease and desist from enforcing its no-solicitation and no-distribution rules in a manner inconsistent with this opinion.

This brings us to the case brought here by the Board for enforcement of its order and Nutone's answer to the Board's petition. The questions, as stipulated,

concern the sufficiency of the evidence to support three findings by the Board: (1) that Nutone violated Section 8 (a) (1) by certain actions toward employees in respect to union activities; (2) that Nutone's failure to recall certain employees after an economic layoff was because of union activity; and (3) that a certain employee (Puckett) did not so conduct herself as to render her unsuitable for reinstatement. We have examined the evidence from which the Board derived these findings and think it is substantial. The portions of the Board's order based upon these findings will be affirmed.

Upon the foregoing bases the order of the Board must be modified as indicated in this opinion and, as so modified, will be enforced.

2. Judgment Below

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1956

No. 12754

United Steelworkers of America, CIO, petitioner

v.

National Labor Relations Board, respondent

Nutone, Incorporated, intervenor

October Term, 1956

No. 12812

National Labor Relations Board, petitioner

v.

Nutone, Incorporated, respondent

United Steelworkers of America, CIO, intervenor

On Petition to Review and Modify an Order of the National Labor Relations Board (No. 12754) and on Petition to Enforce the Order (No. 12812).

Before: PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and decreed by this Court:

(1) that these cases be, and they are hereby, remanded to the National Labor Relations Board with directions to modify paragraph (c) of the order involved herein in conformity with the opinion of this Court;

(2) that for the foregoing purpose the Clerk be, and he is hereby, directed to issue forthwith to the National Labor Relations Board a certified copy of this order and decree;

(3) that the order of the National Labor Relations Board, as so modified, be enforced;

(4) that within ten days herefrom the Board shall file a supplemental record containing its order modifying paragraph (c) of its order herein in conformity with the opinion of this Court, and shall also submit, in accordance with Rule 38 (b) of this Court, a proposed enforcement decree.

Dated: NOVEMBER 23, 1956.

Per *Circuit Judge* PRETTYMAN.

3. STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or dis-

trict, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and

thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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